U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-S-, INC.

DATE: JUNE 15, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of software development services, seeks to employ the Beneficiary as a "senior member technical staff." It requests his classification under the second-preference immigrant category as a member of the professions holding an advanced degree or its equivalent. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. business to sponsor a foreign national with a master's degree, or a bachelor's degree followed by five years of experience, for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner neither established itself as a successor in interest of the employer listed on the accompanying certification from the U.S. Department of Labor (DOL), nor demonstrated its required ability to pay the proffered wage. On appeal, we affirmed the Director's decision. *See Matter of P-S-, Inc.*, ID# 738124 (AAO Nov. 22, 2017). We also found that the Petitioner did not establish the Beneficiary's qualifications for the offered position.

The matter is now before us on the Petitioner's motion to reconsider. The Petitioner asserts that we erred in finding successorship barred by the timing of its acquisition of the labor certification employer and a change in the job offer. The Petitioner also contends that our ability-to-pay determination did not properly consider the magnitude of its business operations and unjustly required its demonstration of an ability to pay proffered wages of multiple petitions. In addition, the Petitioner contends that we unfairly considered the Beneficiary's qualifications for the offered position and asserts the sufficiency of its evidence.

Upon review, we will deny the motion to reconsider.

I. MOTION REQUIREMENTS

A motion to reconsider must establish that our prior decision, as of the record at that time, misapplied law or policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must also include citations to supporting precedent or adopted decisions, statutory or regulatory provisions, or statements of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy.

II. SUCCESSORSHIP IN INTEREST

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an advanced degree professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). Here, our appellate decision found the accompanying labor certification invalid, concluding that the Petitioner did not establish itself as a successor in interest of the employer listed on the certification. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482 (Comm'r 1986) (holding that a petitioner may use another business's labor certification if it demonstrates its successorship to the business).

To establish successorship, a petitioner must: 1) document its acquisition of a labor certification employer's business; 2) establish that, but for the ownership change, the offered position remains the same as stated on the labor certification; and 3) prove its eligibility as a petitioner, including its ability to pay a proffered wage. *Id.* at 482-83. Here, we found that, because the location of the position's primary worksite changed, the Petitioner does not offer the same job opportunity stated on the labor certification. We also found successorship unavailable because the Petitioner acquired the business of the labor certification employer years before the filing of the certification application.

On motion, the Petitioner concedes that, while the labor certification employer based its operations in Massachusetts, it makes its headquarters in California. The Petitioner, however, argues that the job opportunity remains the same because the labor certification and advertisements for the offered position identified the worksite as the Massachusetts headquarters "and various, unanticipated sites throughout the United States." Because the position requires possible relocation to client sites anywhere in the country, the Petitioner argues that the change of headquarters did not alter the location of the job opportunity. The Petitioner states: "It should not make a difference whether the employee is assigned to a client project site in [California] or whether the employee is now being relocated to the employer's new headquarters."

We acknowledge that the offered position allows relocation within the United States. As our appellate decision indicated, however, the designation of Massachusetts as the position's primary worksite on the labor certification affected the proffered wage. The proffered wage of $119,226 a year reflects the occupation's prevailing wage at the headquarters of the labor certification employer in Massachusetts. Online DOL records indicate that, as of the prevailing wage determination in 2016, the annual prevailing wage of the offered occupation at the Petitioner's California headquarters was $138,362, almost $20,000 higher. *See* Foreign Labor Certification Data Center, Online Wage Library, https://www.flcdatacenter.com (last visited June 11, 2018). Basing a proffered wage on a location unrelated to an actual worksite invalidates a job opportunity. *Matters of Paradigm Infotech, Inc.*, 2007-INA-00003, 2007 WL 1798690 *5 (BALCA June 15, 2007); *Matters of eBusiness Applications Solutions, Inc.*, 2005-INA-87, 2006 WL 4579779, *8 (BALCA Dec. 6, 2006).

Moreover, under USCIS policy, a job opportunity does not remain the same if it includes a change that could have affected recruitment of U.S. workers for the position.

> USCIS [officers] should deny any successor claim where the successor is requesting changes to the labor certification that, if made at the time that the labor certification was filed with DOL, could have affected the number or type of available U.S. workers that applied for the job opportunity.

Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Ops., USCIS, HQ 70/6.2, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37)* 5 (Aug. 6, 2009).

Here, the change in the job's primary worksite from Massachusetts to California would have required a higher proffered wage. A higher proffered wage, in turn, could have attracted additional and more qualified U.S. workers to the job opportunity. Thus, under USCIS policy, the job opportunity does not remain the same.

Counsel asserts that, as of the filing of the labor certification application, the Petitioner was headquartered in Massachusetts, not California. Assertions of counsel, however, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). The record must substantiate counsel's statements with independent evidence, which may include affidavits and declarations. Also, we note that the annual corporate reports the Petitioner filed in Massachusetts since 2013 list the company's principal addresses in California. *See* Sec'y of the Commonwealth of Mass., Corps. Div., "Search for a business entity," http://corp.sec.state.ma.us/corpweb/CorpSearch/CorpSearch.aspx (last visited June 11, 2018). The record therefore does not establish the location of the Petitioner's headquarters in Massachusetts or the company's offer of the same job opportunity listed on the labor certification.

In addition, the Petitioner acquired the labor certification employer's business in 2013, more than three years before the labor certification application's filing in 2016. The Petitioner asserts that "[t]he timing of the corporate merger should not be relevant as [the Petitioner] confirmed in the I-140 petition that it was willing to sponsor [the Beneficiary] for a permanent full-time position."

Neither USCIS nor DOL policy, however, permits successorship based on an acquisition occurring so long before a labor certification's filing. USCIS policy states: "For successor-in-interest purposes, the transfer of ownership may occur at any time *after the filing or approval of the original labor certification* with [the] DOL." USCIS Policy Memorandum PM-602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revision to the Adjudicator's Field Manual (AFM) Chapter 22.2.23* (Dec. 22, 2010), https://www.uscis.gov/laws/ policy-memoranda (emphasis added) (last visited June 8, 2018). The DOL recognizes a successorship created before the filing of a labor certification application, but only if the certification's employer was acquired after it began advertising an offered position in its name. DOL, Office of Foreign Labor Certification, OFLC Frequently Asked Questions and Answers, Advertisement Content, Question #10, https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (last visited June 8, 2018).

Timing the Petitioner's acquisition also violates DOL regulations. A labor certification employer must "propose[] to employ a full-time employee at a place within the United States." 20 C.F.R. § 656.3 (defining the term "employer"). Here, because the Petitioner acquired the labor certification employer's business years before, the record does not establish the labor certification employer's intention to employ the Beneficiary in the offered position as of the certification application's filing. The Director asked the Petitioner why it did not file a labor certification application of its own for the position, but the Petitioner did not respond. Thus, based on the Petitioner's acquisition of the employer's business years before the labor certification's filing, the record does not establish the Petitioner's claimed successorship.

For the foregoing reasons, the motion does not establish an error of fact or law in our successorship determination.

III. ABILITY TO PAY

The Petitioner also asserts that the appellate record established its ability to pay the annual proffered wage of $119,226. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its continuing ability to pay, from a petition's priority date until a beneficiary obtains lawful permanent residence).[1] The Petitioner notes that - in 2016, the year of the petition's priority date - it paid the Beneficiary $114,823.01, nearly equaling the annual proffered wage amount. The Petitioner states that it has operations around the world, employs more than 1,600 people in the United States, and has total assets of more than $933 million, including more than $73 million in cash or cash equivalents. It therefore argues that it had the ability to pay the $4,402.99 difference between the annual proffered wage and the amount it paid the Beneficiary in 2016.

As our appellate decision found, however, the record lacks required evidence of the Petitioner's ability to pay the proffered wage in 2016. Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2). The Petitioner submitted audited financial statements for 2014 and 2015. But, contrary to 8 C.F.R. § 204.5(g)(2), the record lacks required evidence of the Petitioner's ability to pay in 2016 or thereafter. The record therefore does not demonstrate the Petitioner's ability to pay the proffered wage from the petition's priority date.

Also, the Petitioner's reference to its total asset amount provides little support for its claimed ability to pay. Total assets include assets not immediately available to pay wages and exclude liabilities. Instead, to determine a petitioner's ability to pay, we examine its net income and net current assets.[2]

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[1] This petition's priority date is August 29, 2016, the date the DOL received the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[2] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, Inc. v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015).

Here, the Petitioner's audited financial statements reflect negative amounts of net income and net current assets for both 2014 and 2015.

As our appellate decision also found, USCIS records indicate the Petitioner's filing of immigrant petitions for other beneficiaries that were pending or approved as of this petition's priority date, or submitted thereafter. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and its other petitions from this petition's priority date of August 29, 2016, until the other beneficiaries obtained lawful permanent residence. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where the petitioner, as of the filing's grant, did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[3]

The Petitioner argues that we unjustly require demonstration of its ability to pay multiple proffered wages. The Petitioner states that "USCIS never brought up this point in the denial and Petitioner never had a chance to present evidence." On appeal, however, we exercise *de novo* review, which allows us to raise new issues. *See Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). Also, our appellate decision notified the Petitioner that it must demonstrate its ability to pay multiple proffered wages. The Petitioner therefore had a chance, with this filing, to submit additional evidence of its ability to pay multiple proffered wages. A motion to reopen with this filing could have also included required evidence of its ability to pay in 2016.[4]

The Petitioner further asserts that other factors established its ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967) (allowing us to consider factors beyond a petition's net income and net current assets). The Petitioner argues that it has conducted business since 2013, regularly pays its employees, and has grown since its founding. In our appellate decision, however, we considered those and other factors under *Sonegawa*. We found positive factors overshadowed by negative ones, including the Petitioner's accrual of $740.6 million in losses since its inception and its obligation to demonstrate its ability to pay multiple beneficiaries.

For the foregoing reasons, the Petitioner's motion does not establish our ability-to-pay determination as factually or legally erroneous.

[3] A petitioner need not demonstrate its ability to pay proffered wages of other petitions that were denied, withdrawn, or revoked.

[4] In any future filings in this matter, the Petitioner must provide copies of annual reports, federal income tax returns, or audited financial statements for 2016, and, if available, 2017. The Petitioner must also provide the proffered wages and priority dates of its other petitions that were pending or approved as of August 29, 2016, or submitted thereafter. The Petitioner should also submit evidence of any wages it paid to the other beneficiaries in 2016 or thereafter. The Petitioner may also submit additional evidence of its ability to pay.

IV. THE REQUIRED EXPERIENCE

The Petitioner also asserts that we erred in finding insufficient evidence of the Beneficiary's qualifying experience and special skills for the offered position. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977) (requiring a petitioner to establish a beneficiary's possession of all DOL-certified job requirements by a petition's priority date). The Petitioner argues that it established the Beneficiary's qualifications by submitting a letter from his former employer on company stationery and a letter from his former manager on the manager's personal stationery.

The letter on company stationery states the Beneficiary's claimed job title and dates of employment. But the letter does not describe his experience or skills. *See* 8 C.F.R. § 204.5(g)(1) (requiring a petitioner to support a beneficiary's claimed experience with a letter from a former employer containing "a specific description of the duties performed by the alien"). The letter therefore does not establish the Beneficiary's claimed qualifications.

The letter from the Beneficiary's purported former manager describes the Beneficiary's job duties and skills. The record, however, lacks evidence of the manager's purported former affiliation with the employer. The letter therefore does not constitute reliable evidence of the Beneficiary's claimed, qualifying experience and skills.

The Petitioner asserts that "common practice" warrants a favorable determination because the company letter confirms information in the manager's independent letter. The letter of the purported former manager, however, constitutes the only evidence of the Beneficiary's claimed former job duties and qualifying skills. Without documentary corroboration of the manager's former affiliation with the employer during the Beneficiary's claimed tenure, the letter is insufficiently reliable to establish his former job duties and qualifying skills.

Also, because the Director's request for evidence did not address the Beneficiary's qualifications, the Petitioner asserts that we unfairly considered the issue on appeal. As previously discussed, however, our appellate *de novo* review allows us to consider additional issues. Although our appellate decision informed the Petitioner of this denial ground, the Petitioner did not submit additional evidence of the Beneficiary's qualifications in a motion to reopen with this filing.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the minimum experience and skills required for the offered position.

V. CONCLUSION

After careful reconsideration, the record does not establish the Petitioner's status as a successor in interest of the labor certification employer, its ability to pay the proffered wage, or the Beneficiary's qualifications for the offered position. The motion therefore does not demonstrate our misapplication of facts or law, and lacks support from relevant legal authorities.

ORDER: The motion to reconsider is denied.

Cite as *Matter of P-S-, Inc.*, ID# 1259376 (AAO June 15, 2018)